

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 23, 2013

v

PATRICK OLIVER SMITH,

Defendant-Appellant.

No. 308610
Wayne Circuit Court
LC No. 11-010663-FC

Before: M. J. KELLY, P.J., and CAVANAGH and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of armed robbery, MCL 750.529. He was sentenced to serve 120 months to 180 months in prison. We affirm, but remand for the ministerial task of correcting defendant's presentence investigation report and forwarding a corrected copy to the Department of Corrections.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence to support his armed robbery conviction. We disagree.

This Court reviews a challenge to the sufficiency of the evidence de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). "When reviewing a claim that the evidence presented was insufficient to support the defendant's conviction, this Court must view the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find beyond a reasonable doubt that the prosecution established the essential elements of the crime." *People v Kissner*, 292 Mich App 526, 533-534; 808 NW2d 522 (2011). "Circumstantial evidence and reasonable inferences arising therefrom can sufficiently establish the elements of a crime." *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001).

Pursuant to MCL 750.529, a person is guilty of armed robbery when he "engages in conduct proscribed under section 530 [unarmed robbery] and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead

any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon” Under MCL 750.530, a person is guilty of unarmed robbery when that person, “in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear”

Although there was no evidence that defendant verbally represented to the victim that he possessed a weapon, if there was sufficient evidence that defendant used or fashioned an article in a manner to cause Sanders to reasonably believe that he possessed a dangerous weapon or if defendant otherwise represented that he was in possession of a dangerous weapon his conviction will be upheld. The jury may find the existence of an article fashioned as a dangerous weapon on the basis of circumstantial evidence. *People v Jolly*, 442 Mich 458, 470; 502 NW2d 177 (1993). “The existence of some object, whether actually seen or obscured by clothing . . . is objective evidence that a defendant possesses a dangerous weapon or an article used or fashioned to look like one.” *Id.* at 469. The use of a hand can suffice to prove armed robbery. *People v Burden*, 141 Mich App 160, 165; 366 NW2d 23 (1985).

In support of his insufficiency argument, defendant relies on *People v Banks*, 454 Mich 469, 480-481; 563 NW2d 200 (1997). In that case, the victim thought the defendant’s accomplice was armed but did not observe a weapon, article, or bulge and was not threatened by the defendant; thus, this Court concluded that there was no objective evidence to support an armed robbery conviction. Here, Sanders testified that, when defendant moved toward her and demanded that she open the cash drawer, he had his hand in his pocket in a manner that made her believe he had a gun. And, when defendant made physical contact with her, she felt something hard in the area of his pocket, which made her believe that defendant was in possession of a gun. Because Sanders believed that defendant had a gun, she opened the cash drawer. Viewing the evidence and its reasonable inferences in the light most favorable to the prosecution, there was sufficient evidence to allow a rational juror to conclude beyond a reasonable doubt that defendant was “armed” during the commission of the robbery pursuant to MCL 750.529.

II. STANDARD 4 BRIEF

In a supplemental brief filed in propria persona pursuant to Supreme Court Administrative Order No. 2004–6, Standard 4, defendant presents additional issues.

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied the effective assistance of counsel because his trial attorney failed to request an evidentiary hearing, allowed jurors to be impaneled that had been victims of a crime, and failed to investigate defendant’s background, including his mental health and alcohol abuse.

To preserve the issue of ineffective assistance of counsel, a defendant must either move for a new trial or for a hearing pursuant to *People v Ginther*, 390 Mich 436, 444; 212 NW2d 922 (1973). Defendant did not move for a *Ginther* hearing or a new trial in the lower court; thus, this Court's review is limited to errors apparent on the record. *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012). Unpreserved claims of constitutional error are reviewed for plain error affecting defendant's substantial rights. *People v Borgne*, 483 Mich 178, 196; 768 NW2d 290 (2009).

To establish an ineffective assistance of counsel claim, a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "To demonstrate prejudice the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Carbin*, 463 Mich at 600.

First, defendant argues that his attorney's performance was deficient because he did not request an evidentiary hearing on the warrant and, therefore did not have sufficient discovery to prepare an adequate defense. However, defendant does not address what evidence his counsel would have discovered and what could have been done to prepare an adequate defense. The only factual issue in the case was whether defendant was armed when he committed the robbery. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). In addition, defendant does not show the existence of a reasonable probability that, but for counsel's failure to request an evidentiary hearing on the warrant, the result of the proceeding would have been different. *Carbin*, 463 Mich at 600.

Second, defendant argues that he was denied the effective assistance of counsel because his attorney picked jurors who were victims of crime. However, jurors are presumed competent and impartial. *People v Miller*, 482 Mich 540, 550; 759 NW2d 850 (2008). It is the defendant's burden to prove that a juror was not impartial or that the juror's impartiality is in reasonable doubt. *Id.* at 550. Here, defendant wholly fails to establish that any of the jurors were not impartial or that their impartiality was in reasonable doubt. And he does not challenge the trial court's voir dire of the jurors. Accordingly, this issue is without merit.

Third, defendant argues that his attorney was ineffective because he did not request psychological records regarding defendant's mental health and alcohol abuse history and, therefore, did not present an adequate defense. Defendant references insanity as a possible defense, but offers no proof of how his records would have assisted such a defense. Therefore, defendant has not established that, but for his counsel's failure to request records regarding defendant's history, the result of the trial would have been different. See *Carbin*, 463 Mich at 600.

B. PROCEDURAL ERRORS

Defendant presents two claims of procedural error, neither of which were preserved for appeal. First, defendant argues that the district court erred in refusing to address his in propria persona motion to dismiss all charges because the complaint was not properly date stamped as required by MCR 8.119(C). The district court refused to address the motion because defendant was represented by trial counsel. Second, defendant argues, relying on MCR 6.101(B) and (C), that his arrest was illegal because the affidavit was not filed, signed, or placed on the record.

However, any such procedural errors were harmless and do not merit relief. The fact that the district court clerk may not have properly date stamped the complaint did not prejudice defendant. The lower court register of actions shows that the warrant was the first document filed in the case. Moreover, defendant has not shown that his arrest was illegal. The warrant and the complaint appear in the lower court file provided to this Court and contain signatures of the assistant prosecutor as the complaining witness and the magistrate with the date. Therefore, MCR 6.101(B) and (C) were satisfied.

C. SENTENCING

Finally, defendant argues that the trial court abused its discretion in scoring five points for Offense Variable (OV) 1 and 75 points under Prior Record Variable (PRV) 1. This sentencing issue was not preserved. A defendant may not challenge on appeal the scoring of the guidelines or the accuracy of information relied on in determining a sentence within the appropriate guidelines unless the challenge was raised at sentencing, in a proper motion for resentencing, or in a proper motion to remand. MCL 769.34(10); *People v Jackson*, 487 Mich 783, 791; 790 NW2d 340 (2010). In any case, defendant's claims are without merit.

MCL 777.31 provides that OV 1 should be scored at five points, for aggravated use of a weapon, if a weapon was implied. See MCL 777.31(1)(e). However, as the prosecution concedes on appeal, MCL 777.31(2)(e) prohibits the scoring of five points if the conviction offense is armed robbery. Thus, here, the trial court incorrectly agreed with defendant's argument at sentencing that OV 1 should be scored at five points. Nevertheless, defendant is not entitled to resentencing because the scoring error did not affect the minimum guidelines range. See *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003). Defendant's total OV score was five, placing him at OV level I. But after the scoring of OV 1 is corrected, defendant will remain at OV level I with the same minimum guidelines range of 108 to 180 months. See MCL 777.62. Accordingly, defendant is not entitled to resentencing. However, as suggested by the prosecution, we remand this matter for correction of the scoring error.

Defendant also argues that the trial court erred in scoring PRV 1 at 75 points. Pursuant to MCL 777.51(1)(a), PRV 1 is scored at 75 points if the "offender has 3 or more prior high severity felony convictions." Defendant argues that, including this armed robbery conviction, he only has two high severity felony convictions that meet the requirements of MCL 777.50 because no discharge date was provided for his 1992 felony convictions. However, MCL 777.50(3) provides that, if a discharge date is not available, "add either the time defendant was sentenced to probation or the length of the minimum incarceration term to the date of the conviction and use that date as the discharge date." In any case, defendant's total PRV score was

105. Even if we agreed that the score for PRV 1 should have been 50 points, as he argues, the total PRV score would be 80 points, which continues to place defendant at PRV level F, corresponding to a minimum guidelines range of 108 to 180 months. See MCL 777.62. Accordingly, defendant is not entitled to appellate relief.

Affirmed, but remanded for the ministerial task of correcting defendant's presentence investigation report and forwarding a corrected copy to the Department of Corrections. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Christopher M. Murray